IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

JAMES TSAKALAS)
) CIVIL ACTION NUMBER
Plaintiff)
) 12С-04-270-ЈОН
V.)
)
EDWARD A. HICKS AND)
JAMES E. VEIT)
)
Defendants)

Submitted: February 12, 2013 Decided: February 22, 2013

MEMORANDUM OPINION

Upon Defendants' Motion for Summary Judgment - **DENIED**

Appearances:

Gary S. Nitsche, of Weik Nitsche & Dougherty, Wilmington, Delaware, Attorney for Plaintiff, James Tsakalas

Miranda D. Clifton, Esquire, of The Law Offices of Cynthia Beam, Newark, Delaware, Attorney for Defendants, Edward Hicks and James Veit

HERLIHY, Judge

Defendants have moved for summary judgment on the basis that plaintiff, James Tsakalas, has failed to meet the Court's deadline for producing a medical expert/opinion that their negligence caused his injury. Since causation requires expert testimony, the failure to provide such an opinion when due means plaintiffs' case should be dismissed. In making their motion, the defendants relied upon a decision of this Court which, when issued, supported their position. Since their motion was made, however, that decision has been reversed. Dismissal is not the option here. Accordingly, defendants' motion is **DENIED**.

Background

While the auto accident underlying this case occurred in May, 2010, suit was not filed until April, 2012. The Court issued a scheduling order on June 19, 2012, setting a discovery deadline of November 12, 2012 - to focus on liability and expert issues - and a case dispositive deadline of December 11, 2012. It is on that date that defendants moved for summary judgment. In the discovery time frame, plaintiff identified three physicians whom he claimed would opine about permanency and causation. However, plaintiff has not provided any medical reports. Attached to plaintiff's answers to Form 30 Interrogatories were notes of one of the three doctors. The notes were not provided as part of defendants' attachments to their motion. Defendants represent the notes from

one of the three doctors "specifically states he cannot relate the neck issue to the accident."

During the discovery period, neither defendant moved to compel production of any medical records.

Parties' Contentions

Defendants argue that not only must the plaintiff prove either, or both of them were negligent, plaintiff must show that their negligence was a proximate cause of the claimed injuries. Except in rare instances, proximate cause of injury requires expert medical testimony. Since plaintiff has failed to produce that requisite evidence through medical reports, his claim necessarily fails.

On the other hand, the plaintiff's counsel states that the tried to obtain the medical reports prior to the Court's discovery cut-off deadline, but he has been unable to do so. He says, as a result, he has or is undertaking efforts to have plaintiff examined by another doctor. He asserts there is no prejudice as there is no trial date set and that the Court should establish a new scheduling order.

Applicable Standard

Defendants' current motion is not in the vein of the traditional summary judgment motion. It is not an issue of whether there are genuine issues of material fact, but one of failure to produce evidence to support a fundamental element of one's

¹ Defendants' Mot. for Summ. J., ¶ 6.

complaint. Where as here, there has been adequate time to produce the necessary report - over two and a half years - the standard to be employed is the same as for a directed verdict.²

Discussion

Oral argument on the defendants' motion was scheduled for Tuesday, February 13, 2013. It had to be cancelled due to the killings in the courthouse lobby the day before, and that area was still an active crime scene on the 12th. The Court made an attempt on to have oral argument over the phone the next day, but counsel were unable to do so. That unsuccessful effort prompted the Court to re-examine the written submissions, which led it to conclude it would rule based on the submissions, without oral argument. While there were a few questions the Court had for counsel, the Court believes the answers would not change this decision.

Defendants are correct that not only must the plaintiff prove their negligence, but he must show such negligence was a, or one of the proximate causes, of his injury.³ Further, to establish such proximate cause, plaintiff must do so by expert medical testimony.⁴

² Burkhart v. Davies, 602 A.2d 56, 60 (Del. 1991).

³ Culver v. Bennett, 588 A.2d 1094, 1097 (Del. 1991).

⁴ Mazda Motor Corp. v. Lindahl, 706 A.2d 527, 535 (Del. 1998).

As noted earlier, defendants relied upon a decision in this Court as support for their position. That case was *Hill v. DuShuttle*.⁵ In that personal injury case, this Court established an expert report deadline, which counsel informally extended, but the plaintiff failed to produce medical reports, either by the Court's deadline or by their informal - not approved by the Court - different deadline. Unlike here, the defendants moved to compel medical reports. Again, however, the plaintiff failed to provide medical reports. Accordingly, the Court granted defendants' motion to exclude expert testimony and dismiss.

On appeal, this Court's opinion was reversed.⁶ In announcing its decision, the Supreme Court referred back to *Drejka v. Hitchens Tire Serv. Inc*,⁷ which reversed a decision of this Court. In *Drejka*, this Court had excluded an expert report supplied two months before the trial date stating that was too late for the defendant to rebut it. Starting with the proposition that this Court has discretion in imposing sanctions, the Supreme Court, nevertheless, reiterated the Delaware "rule" that dismissal is severe and rare.⁸ Further, the courts are admonished to have cases resolved on their merits.⁹

 $^{^5}$ 2011 WL 2623349 (Del. Super. July 5, 2011), $\it rev'd$ 58 A.3d 403 (Del. 2013).

⁶ Hill v. DuShuttle, 58 A.3d 403 (Del. 2013).

⁷ 15 A.3d 1221 (Del. 2010).

⁸ *Id.* at 1224.

⁹ *Id*.

The Supreme Court reiterated a six-part test to determine if dismissal is an abuse of discretion:

[T]o determine whether the trial court has abused its discretion in dismissing or refusing to lift a default, we will be guided by the manner in which the trial balanced the following factors, ... and whether the record supports its findings: (1) the extent of the party's personal resposibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.¹⁰

The Supreme Court's reversal in *Hill v. DuShuttle* was not the only opinion it issued on January 2, 2013. It was part of a trilogy of cases issued the same day; *Keener v. Isken*¹¹ and *Christian v. Counseling Resource Assoc., Inc.*, ¹² were the other two. *Keener* involved a reversal of the Court for refusing to reopen a summary judgment after the non-moving party missed a deadline to respond to the summary judgment motion. The Supreme Court held this Court did not address the requirements of Superior Court Rule 60(b) in refusing to reopen the judgment.

Christian is more akin to this case. This Court had excluded plaintiffs' experts because their reports were not provided in compliance with the scheduling order

¹⁰ 15 A.3d at 1224 (citing *Minna v. Energy Coal S.p.A.*, 984 A.2d 1210, 1215 (Del. 2009)).

¹¹ 58 A.3d 407 (Del. 2013).

¹² 2013 WL 22042 (Del. Jan. 2, 2013).

deadline. The trial was six months away, however. This Court refused to meet with counsel to revise the scheduling order. Such a conference may have resolved whether a new trial date needed to be set or whether new discovery deadlines might still allow the original trial date to be maintained.

In *Christian*, the Supreme Court again cited *Drejka*, but acknowledged that it is difficult to consistently apply the six factors.¹³ The Supreme Court continued:

In *Drejka*, this Court identified factors to be considered by the trial courts when considering whether to dismiss a case for discovery violations. But experience has shown that it is difficult to apply the *Drejka* factors consistently. As a result, we think it appropriate to add some refinements - practice guidelines that will afford great predictability to litigants and the trial courts.

Trial scheduling orders are typically issued as much as one year or more before the trial date, which is selected after input from counsel. With discovery deadlines in place, the trial court may have little or no involvement in the case until shortly before trial, when motion in limine, or other potentially dispositive motions must be filed. This procedure is efficient and works well in cases where the parties adhere to the discovery deadlines. There are times, however, when one or all of the parties miss those deadlines. In Delaware, where civility is a cherished value, attorneys are likely to grant their own extensions to opposing counsel without "bothering" the trial court. That practice is commendable, and fosters good will. But it also leads to the predicament that occurred here. The Health Care Providers kept making accommodations until they ran out of time. Indeed, the Christians were actively scheduling deposition when the Health Care Providers, without warning, filed a motion to preclude experts.

To avoid this problem in the future, we now advise litigants that, if they act without court approval, they do so at their own risk. If one party

¹³ 2013 WL 22042, at *3.

misses a discovery deadline, opposing counsel will have two choices – resolve the matter informally or promptly notify the court. If counsel contacts the court, that contact can take the form of a motion to compel, a proposal to amend the scheduling order, or a request for a conference. Any one of these approaches will alert the trial court to the fact that discovery is not proceeding smoothly. With that knowledge, the trial court will be able to take whatever steps are necessary to resolve the problem in a timely fashion.

If the party chooses not to involve the court, that party will be deemed to have waived the right to contest any late filings by opposing counsel from that time forward. There will be no motions to compel, motions for sanctions, motion to preclude evidence, or motions to continue the trial. It is entirely possible, under this scenario, that some vital discovery will not be produced until the day before trial. Still, the party prejudiced by the delay accepts that risk by failing to promptly alert the trial court when the first discovery deadline passes.¹⁴

These "refinements" are helpful. One is the recognition of the prevailing practice among Delaware lawyers practicing in Superior Court to work out among themselves some scheduling issues and not "bother" the Court. Another is the undisputable recognition that no matter how conscientious counsel generally are, they can occasionally miss deadlines.

In *Christian*, the Supreme Court noted one of three options counsel may have when discovery deadlines are missed: (1) file a motion to compel, (2) propose an amended scheduling order, or (3) request an office conference.¹⁵ The Supreme Court recognized that more motions and court time may result.

¹⁴ *Id.* at *3-4.

¹⁵ 2013 WL 22042, at *4.

This Court often hears counsel apologizing for "bothering" the Court, during its routine motion calendar, many being motions to compel. Counsel seem, out of an abundance of good manners, to forget we are here to be "bothered" with such things. Candidly, there are times where we may seem annoyed but that is more often due to counsel: (1) not trying first to work out their issues; or (2) occasionally offering frivolous reasons for either filing the motion or opposing it. On the other hand, this judge frequently sees motions to compel on his routine motion calendar that are withdrawn because before being orally presented, the motion had its desired effects. Besides, we would rather have motions and scheduling conferences when and where problems arise rather than get into a bind so amply identified in the *Drejka* and the January 2nd trilogy of cases.

With all of this in mind, the Court turns to this case. Parenthetically, however, the Court must first comment about its system for its scheduling orders. When Superior Court started with individual assignment of civil cases on January 1, 1996, most of the judges' initial scheduling orders did not contain a trial date, but only dates going through various phases leading up to a status conference at which the trial date would be set.

At present, that is probably the minority approach, but this judge has found that setting a trial date after ordering most discovery to be completed and a date for dispositive motions means the trial date once set remains more certain. Further, this

judge reopens the discovery window in the trial scheduling order, but most of the time for updated medical reports, DMEs, etc. Rarely, if ever, has this judge been confronted with the all or nothing circumstances as in *Drejka*, *Christian*, *Keener* or *Hill*. It is a matter of personal preference how my caseload has been managed for seventeen years.

Of course with *Daubert*¹⁶ and *M.G. Bancorp., Inc. v. Le Beau*,¹⁷ new complications arose in scheduling orders for all Superior Court judges. This judge's initial scheduling orders instruct counsel to focus on liability and expert witness issues in the initial discovery window; "*Daubert*" hearings sooner, rather than later, are much preferred.

Again, returning to this case, there are several problems. Plaintiff's case was filed twenty-three months after the accident. Why was a medical report, for even a pre-filing demand letter not obtained? It is now nearly three years since the accident and no such report exists. When did plaintiff's counsel realize the doctors were not forthcoming?¹⁸ Did plaintiff's counsel inform defendants' counsel of the difficulties he

¹⁶ 509 U.S. 579 (1993).

¹⁷ 737 A.2d 513 (Del. 1999).

¹⁸ This judge in private practice personally experienced physicians who were paid to supply their reports who never or untimely did so. The Court is not unsympathetic, therefore, to plaintiff's counsel's dilemma. The Court believes if a doctor want to treat auto accident victims, he or she is professionally obligated as part of the treatment to timely respond to counsel's request to supply a report, especially when paid to do just that.

was encountering in getting reports? There is nothing in the record to suggest the plaintiff himself is at fault. Further, it is unknown to the Court whether plaintiff's alleged injuries were such that medical opinions for nearly two years before the case was filed could be rendered.

Defense counsel is not off the hook either. She did not file a motion to compel. And, of course, what is often overlooked with such motions is that Superior Court Rule 37(e)(1) requires that each such motion to compel have attached a certification of efforts made to get discovery compliance *prior* to filing the motion. Absent defense counsel here filing a motion to compel, the Court is unaware of her efforts to get that compliance. Nor does her motion for summary judgment indicate there was any such effort. These would have been the Court's questions to both counsel had there been oral argument. But the probable answers would not have changed this holding.

Pre-trial discovery, as we all know, is meant to eliminate or discourage trial-by-ambush. Yet, to file a summary judgment motion without the requisite motion to compel is exactly that. Defendants have shown no prejudice. They do not say they had to cancel a DME. Clearly, of course, plaintiff and his counsel must supply the fundamental medical reports.

Dismissal is now clearly, the very disfavored remedy. *Drejka* and the January 2, 2013 trilogy proved a clear, unmistakable signal about what counsel and this Court

must do or not do.¹⁹ They may represent a sea change, especially for counsel, and set now, clearer steps to be undertaken *before* dispositive motions are filed.

The Court, therefore, will be in contact with counsel in the very near future to discuss a revised scheduling order, discovery problems, etc.

Conclusion

For the reasons stated herein, defendants' motion for summary is **DENIED**.

IT IS SO ORDERED.

/s/ Jerome O. Herlihy
J.

¹⁹ See e.g. Adams v. Aidoo, 58 A.3d 410 (Del. 2013).